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Supreme Court of The United States

TERM: A. D. 1949

No. 719

Lawrence E. Kelly, Administrator of the Estate of H. M. Kelly, Deceased, and Mollie Kelly,
Petitioners

v.

The Shamrock Oil & Gas Corporation,
Respondent.

# PETITIONER'S MOTION FOR REHEARING

Henry F. Kelly,
Detroit National Bank Bldg.
Detroit, Michigan

Howard F. Saunders,

Albert Smith,
Amarillo Building,
Amarillo, Texas

Attorneys for Petitioners

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## PETITIONER'S MOTION FOR REHEARING

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MAY IT PLEASE THE COURT:

Petitioners, Lawrence E. Kelly, administrator of the Estate of H. M. Kelly, deceased, and Mollie Kelly, respectfully request that the Court set aside its order denying their Petition for a Writ of Certiorari in this cause and grant their petition for the following reasons:

The petitioners based their right to cancel the mineral deed in question upon two distinct theories:

(1) Numerous fraudulent representations made by one C. J. Fowlston while acting as the agent of the defendant; and (2) a secret relationship agency existing between the defendant Shamrock and C. J. Fowlston unknown to H. M. Kelly. In submitting the petitioner's case on fraudulent representations, the court instructed the jury on the law, with respect to the facts necessary to establish "agency", but the court did not instruct the jury on the question of "dual agency" unknown to one of the principals. In other words, the jury was not instructed that if Fowlston was acting as the agent of the Shamrock unknown to H. M. Kelly, then and in that event the Plaintiffs were entitled to a verdict. It was admitted that Fowlston was Kelly's agent.

After summarizing the evidence in this case on "dual agency unknown to H. M. Kelly, the seller," the Circuit Court held that "this evidence made a jury issue on this point" (R. 299). We asked counsel for respondent to point out to you any portion of the court's charge instructing the jury that the plaintiffs were entitled to a verdict if Fowlston was acting as the agent of the Shamrock unknown to Kelly. The respondent did not do so. The Circuit Court of

Appeals did not point it out in their opinion. The reason it was not done is that the trial court did not instruct the jury on that phase of plaintiff's right to a verdict. The petitioners have been caught in this situation: The trial court did not instruct the jury on "dual agency unknown to one of the principals" because he was not familiar with the law. The Circuit Court of Appeals held that the question of secret dual agency had been submitted.

Following the petitioner's motion for a rehearing in the Circuit Court, that court wrote a supplemental opinion in which it stated: "We are of opinion that the issue of concealed double agency was adequately submitted" (R 313-314). The court did not say how it was submitted, however. A jury cannot be presumed to know that if Fowlston (Kelly's admitted agent) was also acting as the agent of the Shamrock unknown to Kelly, the plaintiffs were entitled to a verdict.

As this Court said in St. Paul F. & M. Ins. Co. v. Bachmann, 76 L. Ed. 653:

> "The fact that the defendant had incorporated errors of law in the instructions which it sought upon the second defense did not justify putting the case to the jury solely upon the first."

The instructions requested by petitioners were correct. No one has ever pointed out a single erroneous statement of the law in those requested instructions.

"The rule that a sale made by an agent may be set aside by the principal where the purchaser has paid the agent a secret commission is obviously one of public policy, and the reason for it is plain." Dockstader v. Brown, 204 SW. 2d 356 (Texas Court of Civil Appeals, paragraph 5). When it is shown that a commission was paid unknown to the principal, the right to rescind does not depend upon injury, fraud, or wrongful intent. "This right it might exercise without regard to any actual injury it had sustained and without regard to the effect of the allowance of the commission upon the integrity of its agent." City of Findlay vs. Pertz, 66 Fed. 436.

In this case the Circuit Court of Appeals held that the evidence raised the question of dual agency unknown to Kelly, the seller. Fraud is not an element of the right to rescind in a case of double agency unknown to one of the principals. In submitting the plaintiff's contentions regarding fraudulent representations, the court did not submit "dual agency unknown to the seller."

"However, when it comes to a case of double agency, the principal who did not know that the agent in his employ was also the agent of the other party to the contract has the absolute right to repudiate the transaction upon the discovery of the truth - So, as a matter of public policy, it is generally held that a deal conducted wholly or in part by an agent of one of the parties who at the same time acted for the opposite party may be rescinded by the one ignorant of the double employment without showing any injury or intent to deceive. Rescission is his absolute right." Olson v. Pettibone, 48 A. L. R. 915. Idem: Kansas Life Ins. Co. v. First Bank of Truscott, 78 S. W. 2d 585 (Texas Commission, Pgh. 2); 2 A. J., Agency, Sec. 265; Newton v. Mann, 147 A. L. R. 769, Pghs. 6 and 7.

> "If, without knowledge of the common agency, two persons employ the same agent to conduct a transaction between them, the transaction is voidable at the election of either." Restatement of the Law, Agency, Section 313.
>
> "And it makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public

policy, and the Courts will refuse to enforce a contract growing out of such agency or award damages for its breach." Bass v. Tolbert, 112 S. W. 1078 (Texas C. C. A.).

The petitioners asked the Court to instruct the jury that if they found that the relation of principal and agent existed between Fowlston and the Shamrock during the negotiation period and if they further found that H. M. Kelly did not know that Fowlston was the agent of the Shamrock, that the jury should return a verdict for the plaintiffs. (R. 32, request No. 2). The instruction was refused. There is no instruction anywhere in the Court's charge informing the jury of the law applicable to a double agency unknown to one of the principals. That fact is made evident in petitioners' brief in support of their Petition for Writ of Certiorari beginning on page 11, where the Court's charge is set out in its entirety.

One of the plaintiffs' theories entitling them to recover if the jury found the facts in plaintiffs' favor has not been submitted to the fact-finding body in any shape, form or fashion. In New York Central Railroad Company v. Edward H. Johnson, No. 456, you granted a petition for writ of error saying: "But the argument is to be limited to the question whether the

alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial." 73 L. Ed. 523. Obviously that was a much weaker situation than the one now before the court. This petition should be granted and argument limited to the question of whether or not the court erred in refusing to instruct the jury on secret double agency and the question of whether or not the court submitted the issue of "dual agency unknown to the seller, H. M. Kelly, to the jury."

WHEREFORE, petitioners pray that the order denying a writ of certiorari be vacated and their petition granted.

Respectfully Submitted,

Lawrence E. Lowndes

and

Albert B. Smith

Attorneys for Petitioners,
Amarillo Building,
Amarillo, Texas

## CERTIFICATE OF COUNSEL

I, Albert Smith, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay. A copy of this petition was served upon Mr. R. A. Wilson, counsel for respondents, on this 15 day of June, 1949.

Albert Smith

Counsel for Petitioners